IN THE

Supreme Court of the United States

October Term, 1925.

No. 137.

GIRARD TRUST COMPANY, A CORPORATION, GEORGE STEVENSON, WILLIAM R. VERNER, AND ROBERT GLENDINNING, IN THEIR CAPACITY AS TRUSTEES OF THE ESTATE OF ALFRED F. MOORE, DECEASED, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

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Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OFFICIAL REPORT OF THE COURT BELOW

This case and the opinion of the Court of Claims therein is officially reported at 59 Ct. Cls. 727.

JURISDICTION OF THIS COURT

The judgment appealed from was rendered by the Court of Claims on May 19, 1924. (R. 9.)

The appellants as plaintiffs in the Court of Claims filed this suit for the recovery of additional interest under Sec. 1324 (a) of the Revenue Act of 1921 (42 Stat. 316) on two certain refunds of internal revenue taxes, and also for the recovery of a small balance of an excess profits tax for which their claim for refund had been denied. The amounts of the additional interest in question were stipulated by the parties as $2,028.11 and $3,889.67 (R. 4, 7) respectively, and the amount of the refund claimed was similarly stipulated as $767.79 (R. 4, 5) making an aggregate claim of $6,685.57, with interest on $767.79 thereof. The court below denied the two claims for additional interest on the ground that plaintiffs, having accepted the pricipal sums and some interest, could not maintain an action for additional interest, denied the claim for refund without opinion, and entered judgment for the defendant (R. 9).

The amount in controversy is the said $6,685.57, with interest on a part thereof, and this Court has jurisdiction of this appeal under secs. 242 and 243 of the Judicial Code, and Sec. 14 of the Act of February 13, 1925 (43 stat. 936).

STATEMENT OF THE CASE

The Statute.

Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 316) provided as follows:

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest

was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The facts: time when interest stopped.

Large overpayments of their profits and income taxes for 1917 and 1920 were inadvertently made by appellants, and claims for refund were duly filed and allowed and paid. (R. 5, 6-7.)

The reduction of the taxes and the adjustment of the overpayments were accomplished in exact accordance with the provisions of a regulation duly made by the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) with the approval of the Secretary of the Treasury (T. D. 3260, printed as Appendix No. 1 at page 56 of this brief).

The claims were audited by "the appropriate administrative unit" and on December 9, 1922, E. H. Batson, Deputy Commissioner (in charge of that unit), certified to the Commissioner on Form 7777 (which is headed in bold type "Schedule of Reductions of Tax Liability and Allowance of Abatements and Credits") that the appellants were entitled to a reduction of tax liability of $107,372.36 for 1917 and of $182,538.72 for 1920. This merely meant that the appellants had been overassessed in those amounts, but neither the Deputy Commissioner nor the Commissioner had any means of knowing whether these overassessments had been paid either in whole or in part. Accordingly on the same day, December 9, 1922, the Commissioner signed on the same Form 7777 an "Authorization of Commissioner" addressed "To the Collector 1 Penna. District." in which he approved and allowed the *reduction of tax liability* therein noted and directed the Collector (1) to check the items against the accounts of the several taxpayers,

(2) to determine whether any part of the overassessment was unpaid, and if so to abate it up to the amount of the reduction, (3) if any part was then found to be an overpayment, to examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing thereon (if any), and finally, (4) *to enter the balance (if any)* in column 12 of that form and *on a new schedule of refunds on Form 7777A, a different form, and to certify the same and return it to the Commissioner.* (R. 8, and Exhibit A, facing R. 8.)

Interest on these two refunds was subsequently computed by the Commissioner and paid only to December 9, 1922, and no interest has been paid thereon for any period after that date. (R. 5, 7.)

On December 28, 1922, the Collector, having examined the accounts of the various taxpayers and prepared the new schedule of refunds on Form 7777A (which is headed in bold type "Schedules of Refunds"), certified to the Commissioner that the items had been checked against the accounts of the several taxpayers "*and the amounts of overpayment to be refunded by disbursement checks have been found to be as indicated herein.*" (Exhibits B and C, facing R. 8.) For 1917 the entire overassessment was found to be an overpayment and to be refundable. For 1920, however, only $84,437.43 (out of the total overassessment of $182,538.72) was found to be an overpayment, the balance of $98,101.29 being an unpaid and unsatisfied assessment which was thereupon abated, and, even of the overpayment of $84,437.43 only $84,416.02 was found to be refundable, the balance of $21.41 being credited against an unpaid assessment for a different year (R. 6).

It was not, however, until January 16, 1923, that Form 7777A was returned to Washington and the Deputy Commissioner similarly certified thereon to the Commissioner that: "*The items herein listed have been examined and the amounts of overpayment to be refunded by disbursement checks as indicated herein have been found due.*" (Ex-

hibits B and C, facing R. 8.) The amount so listed for 1917 happened to be the same as that of the overassessment, but the amounts so listed for 1920 was of course only $84,-416.02 although the overassessment was $182,538.72 (R. 5, 6, 8).

On the same day, January 16, 1923, the Commissioner (being for the first time advised of the amounts to be refunded to appellants, or indeed whether any amount at all was to be refunded) signed on Form 7777A the following authorization (R. 8, and Exhibits B and C, facing R. 8.):

"AUTHORIZATION OF COMMISSIONER.
To the Disbursing Clerk, Treasury Dept.:
The several amounts herein listed as refundable are hereby authorized and allowed.
Washington, D. C.
Date Jan. 16, 1923.

Commissioner of Internal Revenue."

A single check for the refund of $107,372.36 for 1917 together with interest of $5,492.17 thereon from February 2, 1922, to December 9, 1922, a total of $112,864.53, was received by appellants by mail on February 7, 1923. (R. 5.)

A check for the refund of $84,416.02 for 1920, without interest, was received by appellants by mail on February 20, 1923. Thereafter, and subsequent to the filing of the petition in this case, a check for $4,318.97, which *inter alia* included interest on the said $84,416.02 from February 2, 1922, to December 9, 1922, was received by appellants by mail on or about October 5, 1923. (R. 6, 7.)

One of the items in this suit is for further interest on the refunds for both 1917 and 1920 from December 9, 1922, either to the date of the *payment of the refunds* or the signing by the Commissioner of Form 7777A on January 16, 1923. (R. 2, 3, 7, 8.)

The facts: time when interest started.

The appellants' income tax for 1920 was originally returned and assessed early in 1921 at $196,202.61. It was based largely on income consisting of profit from the sale of capital assets and appellants attached to their original return, and paid the installments of the tax under, a specific protest setting forth in detail the basis and reasons therefor—viz., that such profits were not taxable income under *Brewster v. Walsh,* 268 Fed. 207. (R. 5-6.)

The second installment of the tax was also paid under an additional express notice to the collector that in view of the joint investigation by accountants of both the Government and the trustees then in progress and of the belief that the 1920 return had been erroneously computed, especially with respect to depreciation, the second installment was paid without prejudice to the appellants' right to be reimbursed for any payment in excess of the total tax as finally determined. (R. 6.)

The first two quarterly installments of $49,050.66 each were paid by appellants on March 15, 1921, and June 15, 1921, respectively, in each case under protest as above. (R. 5-6.)

The reduction of tax liability and refund for 1920 eventually allowed and made were based on the corrections, especially with respect to depreciation, referred to in the notice to the collector accompanying the payment of the second installment, and not on the reasons alleged by appellants in their original protest accompanying their return. (R. 6.)

The appellants' correct income tax liability for 1920 was finally determined at $13,663.89, on which basis the correct amount of the quarterly installments would have been $3,415.98, $3,415.97, $3,415.97, and $3,415.97 respectively. The appellants paid as above set forth $49,050.66 on each of the due dates of the first two installments, but before the due date of the third installment filed claims for the abate-

ment of the balance of the assessment and for the refund of the amounts already paid. (R. 6.)

The appellants paid on March 15, 1921, $45,634.68 more than was due on that date. The appellants similarly paid on June 15, 1921, $45,634.69 more than was then due, but as they did not pay any further installments this overpayment was in effect reduced to $38,802.75 by crediting $6,831.94 thereof in satisfaction of the third and fourth installments of $3,415.97 each which would have been due on September 15, and December 15. (R. 5, 7.)

Interest on the refund for 1920 has been computed only *from* February 2, 1922, (viz., six months after appellants filed claim for refund), but as the original payments were made under specific protests one of the items in this suit is for interest *from the dates of payment* of the original installments *to* February 2, 1922. (R. 3, 7.)

With respect to the refund for 1917, no objection is made by appellants as to the starting point used in the computation of interest, the tax for that year not having been paid under protest.

The facts: amount of refund for 1917.

The appellants' excess profits tax for 1917 as originally assessed early in 1918 amounted to $108,140.15. It was payable June 15, 1918, but it was actually paid and satisfied in full on March 21, 1918, by the cash payment in advance of $107,372.36, being the said $108,140.15 less the credit of $767.79 allowed by Sec. 1009 of the Revenue Act of 1917 (40 Stat. 326) for advance payments. (R. 5.)

It was subsequently determined that appellants as trustees were not subject to an excess profits tax, but there has been refunded only $107,372.36, and one of the items in this suit is for the refund of the remaining $767.79 with interest. (R. 2, 5.)

The Questions.

A preliminary question, not in any way suggested or raised by the record and not argued by either party before the Court below, but nevertheless stated by that Court as the sole ground for its decision is—

> *I. Can appellants maintain a suit for additional interest due under a statute if they accepted the principal sums with some interest?* (Argument, pp. 13 to 23.)

The principal questions on the merits of the case are—

> *II. Should interest on a refund of internal revenue taxes be computed* **to** *the time of the payment of the refund?* (Argument, pp. 23 to 45.)
>
> *III. Should such interest, in any event, be computed at least* **to** *the time when the Commissioner first authorizes its payment by a disbursing officer?* (Argument, pp. 45 to 46.)
>
> *IV. Should such interest be computed* **from** *the time when the tax was paid, if it was paid under a specific protest setting forth the basis of and reasons for such protest, although the refund was made for a different reason.* (Argument, pp. 47 to 50.)
>
> *V. If interest is computed from the time the tax was paid, and if the taxpayer paid the supposed tax in installments, should the excess of the amount paid as an installment over the installment as finally determined be considered as an overpayment and refundable?* Argument, pp. 50 to 51.)

A minor question, having no relation whatever to any of the other questions in the case, is—

> *VI. Should the refund for 1917 be $108,140.15 instead of $107,372.36?* (Argument, pp. 52 to 55.)

SPECIFICATION OF ERRORS

Appellants specify the following errors of the court below:

1. Holding that appellants cannot maintain an action for additional interest even though they may have accepted the principal of the refunds with some interest, when the interest is payable under express statutory authority.

2. Holding that appellants cannot maintain an action for additional interest when the record does not show that they accepted the principal or any interest.

3. Failure to hold that appellants are entitled to recover interest to the time of payment of the refunds.

4. Failure to hold that appellants are entitled to recover interest on $107,372.36 from December 9, 1922, to February 6, 1923.

5. Failure to hold that appellants are entitled to recover interest on $84,437.43 from December 9, 1922, to February 20, 1923.

6. Failure to hold that appellants are entitled to recover interest at least to the time when the Commissioner first authorizes its payment by a disbursing officer.

7. Failure to hold that the first installment of the 1920 tax was paid "under a specific protest setting forth in detail the basis of and reasons for such protest" within meaning of Sec. 1324 (a) of Revenue Act of 1921.

8. Failure to hold that the second installment of the 1920 tax was paid "under a specific protest setting forth in detail the basis of and reasons for such protest" within meaning of Sec. 1324 (a) of Revenue Act of 1921.

9. Failure to hold that appellants are entitled to recover interest on $45,634.68 from March 15, 1921, to February 2, 1922.

10. Failure to hold that appellants are entitled to recover interest on $38,802.75 from June 15, 1921, to February 2, 1922.

11. Failure to hold that appellants are entitled to recover $767.79 additional refund of excess profits tax for 1917.

12. Dismissing appellants' petition and entering judgment for defendant.

SUMMARY OF ARGUMENT

I. Appellants can maintain this suit for additional interest, because even if they accepted the principal of the refunds with some interest they did not thereby waive their right to claim additional interest. (Page 13.)

1. If interest is due by the terms of a contract, the payment of the principal is no bar to the subsequent recovery of the interest. (Page 14.)

2. Where the obligation is one that by statute bears interest, the courts regard this as an equivalent of contractual interests, so that such interest may be recovered even though the principal sum has been paid. (Page 16.)

3. Where interest is payable by statute the acceptance of the principal and a part of the interest is no bar to a subsequent action for the remainder of the interest due. (Page 17.)

4. The decision of this question by the court below has in other cases already been urged on and rejected by three Federal courts, which in every case have held that acceptance of the check issued by the disbursing officer does not bar a taxpayer from maintaining an action to secure additional interest, and the Solicitor General has abandoned the point in his petition for certiorari in one of those cases. (Page 18.)

5. The holding of the court below that appellants are barred from maintaining this suit is as unconscionable and indefensible in fact as it is erroneous in law. (Page 19.)

II. Appellants can in any event maintain the present suit, because the Record does not show whether they ever accepted the principal of the refunds with some interest. (Page 21.)

III. Interest (which was computed by the Commissioner only to December 9, 1922) should in any event have been computed to a date later than December 9, 1922, because the appellants' refunds were not allowed until long after that date. (Page 23.)

1. The very statement of the facts in the record itself shows conclusively that no refund was allowed on December 9, 1922, and that the refund was not allowed at any time prior to January 16, 1923. (Page 23.)

2. The Commissioner's own regulations under this very Revenue Act of 1921, made by him with the approval of the Secretary of the Treasury, point inevitably to the same conclusion. (Page 25.)

3. This Court has expressly held that an act such as the signing of the earlier schedule on December 9 can not be considered as a final determination or allowance by the Commissioner. (Page 26.)

4. Three federal courts have already held that under the procedure here in question the signing of the earlier schedule does not constitute allowance of the refund. (Page 29.)

IV. A refund is not allowed under the statute until it is actually paid by the issuance to the taxpayer of a check for the amount of the refund, and appellants' refunds were therefore not allowed until February 6, 1923, and February 20, 1923, respectively, and appellants are entitled to interest to those dates. (Page 30.)

1. At the time of the enactment of the statute it had already been held that an "allowance" of a refund, under the same R. S. Section 3220 under which these refunds were made, was not consummated until the taxes were actually paid back by a check being issued to the taxpayer, and it must be presumed that Congress used the term in its judicially settled meaning. (Page 30.)

2. Any other construction is unreasonable, because the Commissioner may, at any time before actual payment of the refund, suspend or reverse his authoriza-

tion of its payment, and in a number of cases he has actually done so. (Page 33.)

3. Any other construction is unreasonable, because actual payment of the refund is the only act provided for by statute, and each of the other preliminary acts (a) is merely a procedure of an administrative officer which he can at will abolish or modify, and (b) has in fact, by administrative interposition of successive additional such acts, been moved further and further back in point of time from the actual payment. (Page 34.)

4. Any other construction is unreasonable because in practice the check is often not received for many months after the Commissioner signs the Schedule of Refunds on Form 7777A. (Page 36.)

5. The normal and natural meaning of the words of the statute is that interest is to be paid to the time when the refund is actually paid to the taxpayer. (Page 37.)

6. It is the well established custom of both the business and the legal worlds that interest runs to the date of payment, and there is nothing in the statute to indicate that Congress intended to express any different rule. (Page 39.)

7. Section 1324 (a) is a remedial provision, and if there remains any possible doubt that it expresses the intent of Congress that interest runs to the payment of the refund, it should be construed liberally to that effect and resort may be had to its legislative history. (Page 41.)

V. Appellants' refunds cannot under any conditions be held to have been allowed prior to January 16, 1923. (Page 45.)

VI. Appellants are also entitled to interest on the refund for 1920 from the original date of payment of their taxes for that year. (Page 47.)

1. Where, as here, both installments of the tax were paid under a specific protest setting forth the basis of

ARGUMENT.

I. APPELLANTS CAN MAINTAIN THIS SUIT FOR ADDITIONAL INTEREST, BECAUSE EVEN IF THEY ACCEPTED THE PRINCIPAL OF THE REFUNDS WITH SOME INTEREST THEY DID NOT THEREBY WAIVE THEIR RIGHT TO CLAIM ADDITIONAL INTEREST.

Whether or not a proceeding may be maintained for the recovery of interest after the principal sum or the principal sum with some interest has been paid and accepted depends entirely upon whether the interest (a) is claimed under the express terms of a contract or a statute or (b) is claimed merely as common law damages for the detention of the principal. In the latter case the rule is well established that the right to interest is a mere incident to a suit for the principal and that after the principal sum has been paid, so that no action may be brought for its recovery, the opportunity to recover interest as damages is lost. In the former case, however, *the rule is equally well established that where the claim for interest rests upon a contract or a*

statute a suit therefor may be maintained irrespective of whether the principal or any part of the interest has been paid and accepted.

These two rules are in no way inconsistent with each other and exist side by side in the same jurisdictions. Thus for example in the very case relied upon by the court below (*Stewart vs. Barnes,* 153 U. S. 456) this Court stated at page 463:

> "In a case where a demand of damages constitutes the very ground of the action, it would seem that the rule would be different."

and two years after that decision the Court of Claims in *New York vs. United States,* 31 Ct Cls. 276, expressly reaffirmed its own earlier decision in *Hobbs v. United States,* 19 Ct. Cls. 220, that where interest is claimed under a statute a suit therefor may be maintained after the receipt of the principal.

The claims for additional interest in the present case rest squarely upon a statute, Revenue Act of 1921, Section 1324 (a) (42 Stat. 316), and the cases from this and other courts cited in the following pages show beyond any doubt that a proceeding looking to its recovery may be maintained.

1. *If interest is due by the terms of a contract, the payment of the principal is no bar to the subsequent recovery of the interest.*

Kimball vs. Williams, 36 App. D. C. 43.
Fake vs. Eddy, 15 Wend. (N. Y.) 76.
Robbins vs. Cheek, 32 Ind. 328.
King vs. Phillips, 95 N. C. 245.
Southern Central R. Co. vs. Moravia, 61 Barb. (N.Y.) 180.
Bennett vs. Federal Coal & C. Co., 70 W. Va. 456.
New York Trust Co. vs. Detroit Ry., 251 Fed. 514.

In *Fake vs. Eddy, supra,* the leading case on this point, it was held that an action will lie for interest, the payment

of which is stipulated for in the contract, and which has accrued, though the principal is satisfied; for it is only when interest is not stipulated for in the contract, and is recoverable merely as *damages,* or as an *incident* to the debt, that a creditor is precluded from maintaining an action for its recovery, after accepting the principal. Chancellor Walworth in the opinion of the court (26 out of 27 members of the court in agreement) said at p. 79:

> "the counsel for the plaintiff in error are wrong in supposing that the rule of law that an action cannot be sustained for the interest of a demand after the principal is paid, is applicable to this case. The cases of *Tillottson vs. Preston,* 3 Johns R. 229; *Johnson vs. Brannan,* 5 Idem. 268, and *The People vs. The Corporation of New York,* 5 Cowen's R. 331, were all cases in which there was no contract for the payment of interest, and it could only be recovered as damages for the non-payment of the principal debt when it became due. In such cases, if the party to whom the money is payable accepts the amount agreed to be paid, in full satisfaction of the principal debt, without requiring the debtor to pay interest from the time the debt became payable he cannot afterwards maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest as well as the principal of the plaintiff's demand, I apprehend that the performance of one part of the agreement would be no bar to an action for the non-performance of another part thereof."

In *Kimball vs. Williams, supra,* the Court of Appeals of the District of Columbia adopted the principle of *Fake vs. Eddy,* saying:

> "In actions for the recovery of interest after the payment of the principal has been made, the distinction is well defined; and we think the rule has no exception, that where interest is specified to be paid as a part of the consideration named in the contract, payment of the principal does not constitute a presumption of waiver

> of the interest; but where there is no provision in the contract for the payment of interest, and it can only be recovered by way of damages as an incident of the failure to pay the principal when due, an acceptance of the principal will presume a waiver of the interest, and a separate action cannot subsequently be sustained for the recovery of the interest."

The court then cites with approval the rule stated in *Southern Central Co. vs. Moravia, supra,* and *Fake vs. Eddy, supra,* and with reference to the latter continues.

> "The holding of the New York Court is in perfect accord with *Stewart vs. Barnes,* 153 U. S. 456, chiefly relied upon by counsel for defendant."

2. *Where the obligation is one that by statute bears interest, the courts regard this as an equivalent of contractual interest, so that such interest may be recovered even though the principal sum has been paid.*

> *National Bank vs. Mechanics Bank,* 94 U. S. 437.
> *Hobbs vs. United States,* 19 Ct. Cls. 220.
> *New York vs. United States,* 31 Ct. Cls. 276.
> *Devlin vs. New York,* 131 N. Y. 123.
> *Crane vs. Craig,* 230 N. Y. 452.
> *Smith vs. Buffalo,* 39 N. Y. S. 881.
> *Bowen vs. Minneapolis,* 47 Minn. 115.

In the *Mechanics Bank* case, *supra,* the point is more or less taken for granted, but in the *Hobbs* case, *supra,* the Court of Claims expressly held that a statute providing for interest in certain cases of appeal from decisions on claims against the United States was so far contractual as to authorize a recovery of interest by such a claimant after the payment of the principal sum. In that case the claimant demanded the whole sum due, including interest, but when he was informed that the appropriation was short, he took the amount of the principal. It may be noted in passing that counsel for the United States cited

and relied on the case of *Tillotson vs. Preston,* 3 Johns. 229, which was one of the cases cited with approval by this court in *Stewart vs. Barnes,* as illustrating the principal of that case. However, the opinion of the Court of Claims in the *Hobbs* case clearly showed that the principle of *Tillotson vs. Preston,* which was later adopted by this Court in *Stewart vs. Barnes,* is not applicable to a case where a statute provides for interest. The Court of Claims said at page 228 (italics ours):

> "It is true that it has been held in a certain class of cases that the payment of principal, as such, works a discharge of the interest. These cases, however, do not settle an arbitrary rule, whereby interest is in all cases released contrary to the agreement or intention of the parties. In Wait on 'Actions and Defenses' (vol. 4, page 129) the rule is thus laid down: 'An action will not lie to recover interest after the principal has been paid *unless there was an express contract to pay interest.' In this case the defendants, by their own statute, agreed to pay interest, and there can be no better contract than that.* We are not to presume that the law will sanction an evasion of its own honest provision through inequitable and technical rules of practice. In *Lovett's Case* (94 U. S. R. 53) the Supreme Court said: 'Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration.' "

In *New York vs. United States, supra,* the same court indicated that this Court considered the decision in the *Hobbs* case as announcing the correct principle and said at page 282:

> "If the Supreme Court had intended to reverse the action of this Court in the *Hobbs* case, it would undoubtedly have done so by overruling the claimant's motion to amend the mandate."

3. *Where interest is payable by statute the acceptance of the principal and a part of the interest is no bar to a subsequent action for the remainder of the interest due.*

Crane vs. Craig, 230 N. Y. 452.
Woodward-Brown R. Co. vs. N. Y., 197 N. Y. S. 165.

Crane vs. Craig, supra, decided by the Court of Appeals of New York in 1921, is a case squarely in point. In that case it was held that an acceptance of the principal of an award and a part of the interest allowed by statute was not a waiver of the balance of interest due. The opinion of the court, after referring *with approval* to *Stewart vs. Barnes,* and the rule laid down in that case, continues at page 461 (italics ours):

> "But where interest is specifically reserved by the instrument and forms an integral part of the debt, the rule is different for then the acceptance of the principal without interest does not extinguish the debt, and the mere acceptance of part, either of principal or interest, does not bar a subsequent claim for the whole, whether with or without protest, for the payment of part is not generally a satisfaction of the whole, unless there is an agreement of some kind that the payment made should be a satisfaction of the whole. (Citing cases.)
>
> "*In this case the statute specifically allowed interest.* The interest was, therefore, by analogy of reasoning, a part or relator's claims. *Acceptance of principal and part of the interest did not extinguish the claim.*" (Citing cases.)

4. *The decision of this question by the court below has in other cases already been urged on and rejected by three Federal courts, which in every case have held that acceptance of the check issued by the disbursing officer does not bar a taxpayer from maintaining an action to secure additional interest, and the Solicitor General has abandoned the point in his petition for certiorari in one of those cases.*

In *United States ex rel. Birkenstock, et al., v. Blair* (unreported) decided by the Supreme Court of the District of Columbia, January 2, 1925, the record had been expressly amended to show that the taxpayer had accepted and cashed the disbursing officer's check for the refund and interest

computed exactly as in this case, and the question was argued by counsel for both parties. The court, held, however, that the taxpayer was entitled to maintain an action for the additional interest which it sought and gave judgment in favor of the taxpayer.

In the same case on appeal, *Blair v. United States ex rel. Birkenstock, et al.*, 6 Fed. (2d), 679, decided June 1, 1925, the Court of Appeals of the District of Columbia held:

> "It is our opinion furthermore, that the acceptance by the appellees of the check issued to them by the disbursing clerk, does not under the circumstances bar them from maintaining their present action."

and affirmed the judgment of the court below.

This Court has recently allowed the Solicitor General's petition (No. 713, October Term, 1925) for a writ of certiorari to review the decision of the Court of Appeals in the *Birkenstock* case, but in his specifications of errors the Solicitor General did not even refer to this question nor urge that the court was in error in so holding, so it appears that he concedes the correctness of our position on this point.

It is especially significant that in both courts the United States Attorney urged and relied upon the decision of the Court of Claims from which we are here appealing, that both courts deemed it erroneous and held to the contrary, and that the Solicitor General thereupon abandoned the point.

In *Merchants' Loan & Trust Co. v. Smietanka*, decided July 15, 1925, and as yet unreported, the United States District Court for the Northern District of Illinois made a similar decision.

5. *The holding of the court below that appellants are barred from maintaining this suit is as unconscionable and indefensible in fact as it is erroneous in law.*

When in February, 1923, a check for $112,864.53 was transmitted to appellants, $107,372.36 of which was a refund

of an overpayment of taxes for 1917, they had already lost the use of that very substantial sum for five years. How unfair and ridiculous—how unconscionable and indefensible—it is to now say to them that, because they did not defer the acceptance of that check for the several years more which it is taking to secure a final decision as to the interest, they can not even claim the interest to which they believe the law entitles them! That, although it was well recognized that on the claim for refund of the tax itself they could accept the $107,372.36 and still maintain a suit for the disallawed balance of $767.79 (as for example in *Cochran v. United States,* 254 U. S. 387, or in *Boston Insurance Co. v. United States,* 58 Ct. Cls. 611), yet for some mysterious and unexplained reason they could not follow the same practical course with regard to their claim for interest expressly provided for by an Act of Congress! That, although this Court has recently in a series of substantially similar suits against the government by railroads for transportation charges reviewed the cases and in *Southern Pacific Company v. United States,* 268 U. S. 263, decided May 11, 1925, laid down the following principles (italics ours):

> "The question when the substantive right to recover an amount justly due from the government is lost through some act or omission upon the part of the claimant was considered at length in *St. Louis, B. & M. R. Co. v. United States,* No. 310, decided April 27, 1925 (268 U. S. 169), in which the decisions bearing on this question were collated. It was there said that this right 'can be lost only through some act or omission on the part of the claimant, which, under the rules of the common law as applied by this court to claims against the government, discharges the cause of action. Acquiescence by the claimant in the payment by the government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the

> claim. Acquiescence can also be established by showing conduct after the payment which might have led the government to believe that the amount actually received was accepted in full satisfaction of the original claim. *But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver, or from which an estoppel may arise.*"

yet for some arbitrary and illogical reason a contrary rule governs the present case, although the cases are analogous in all substantial respects!

Appellants instituted the present suit within a few months after the refund checks were sent to them, and in fact before the check for $4,318.97 for interest on the 1920 refund was issued (R. 7). Appellants have been diligent in prosecuting the suit in the court below and in this Court, and neither law or common fairness justifies or permits a decision that they could maintain their right to claim a few thousand dollars interest only at the prohibitive cost of deferring for several years the acceptance of payments aggregating $197,280.55 and admittedly due to them.

As was so well stated in *Hobbs v. United States,* 19 Ct. Cls. 228:

> "In this case the defendants, by their own statute, agreed to pay interaest, and there can be no better contract than that. We are not to presume that the law will sanction an evasion of its own honest provision through inequitable and technical rules of practice."

II. APPELLANTS CAN IN ANY EVENT MAINTAIN THE PRESENT SUIT, BECAUSE THE RECORD DOES NOT SHOW WHETHER THEY EVER ACCEPTED THE PRINCIPAL OF THE REFUNDS WITH SOME INTEREST.

For the reasons fully set forth in the pages immediately preceding, appellants believe that in a case such as the

present acceptance of the principal and some interest does not bar a suit for additional interest, and in the interest of settling this question once and for all they ask this Court to so decide.

But in no event can an alleged objection on that ground bar the maintenance of the present suit, and for a reason now to be stated appellants are entitled to a decision on the merits of the substantive points here involved.

Entirely aside from any question as to the applicability of the rule of *Stewart v. Barnes, supra,* to interest claimed under a statute this Court has very recently held in an express reference to that case that the defense there sustained is an *affirmative defense.* In *St. L., B. & M. R. Co. vs. United States,* 268 U. S. 167, this Court said:

> "The affirmative defense of * * * must not be confused with other affirmative defenses which are often interposed to suits in which the plaintiff claims that the government has paid him only a part of what was due. Among these are * * * prior acceptance of the principal of a debt as a bar to a suit for accrued interest;[6] * * *."

and in the footnote "6" to the opinion this court referred to *Stewart v. Barnes,* 153 U. S. 456.

The record in the present case is, however, entirely silent as to whether any of the checks were ever accepted by appellants, and this objection, being an affirmative defense, cannot therefore be entertained. Hence this suit in any event can be maintained and the appellants are entitled to a decision on the merits of the substantive questions which will now be taken up.

Turning to consideration of the case on its merits, we would venture to remind the Court that there has been no adverse decision by the court below or by any other court on any of the points involved on the merits of the case. On

the contrary, on the principal point here involved the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia, and the United States District Court for the Northern District of Illinois, have all decided against the Government and in favor of the taxpayer in the *Birkenstock* case, *supra,* and in *Merchants Loan and Trust Co. v. Smietanka* (D. C., N. D. Ill., E. D., Nos. 33349 and 33395). We are here as appellants, not because of any adverse decision below on the merits, but only because the court below did not pass on the merits as a result of what we believe has just been shown to have been its erroneous decision on the preliminary question of whether this suit could be maintained.

III. INTEREST (WHICH WAS COMPUTED BY THE COMMISSIONER ONLY TO DECEMBER 9, 1922) SHOULD IN ANY EVENT HAVE BEEN COMPUTED TO A DATE LATER THAN DECEMBER 9, 1922, BECAUSE THE APPELLANTS' REFUNDS WERE NOT ALLOWED UNTIL LONG AFTER THAT DATE.

Not only does the record show on its face that the authorization signed by the Commissioner on December 9, 1922, was merely a preliminary step necessary to the determination of the amount of the refund which was subsequently allowed, but both the regulations made by the Commissioner in pursuance of the statute and the decisions of the Court of Claims and of this Court expressly hold that it was not until a later date that *the refund* was allowed.

1. *The very statement of the facts in the record itself shows conclusively that no refund was allowed on December 9, 1922, and that the refund was not allowed at any time prior to January 16, 1923.*

Using as an example the refund for 1920, the record shows that on December 9 the Commissioner as a result of an audit by his office knew only that $182,538.72 too much

tax for 1920 had been assessed against the appellants, but he did not know whether all or any part of that excess had yet been paid by them. The record shows that he did not by any act of his on that date purport to allow or authorize *the payment or refunding* of one single cent of this amount nor did he sign any schedule of authorization addressed to or for transmittal to any disbursing officer. The record shows that on the contrary on that date he signed only an approval of the overassessments which had been determined by audit, and an authorization or instruction to the Collector at Philadelphia to examine among others the account of the appellants, to *abate* any part of the overassessment which had not been paid by them, to apply or *credit* against any outstanding unpaid assessments against them for other years any part of the overassessment which he found to be an overpayment, and—not to refund, for the collector was not a disbursing officer, nor had the payment of any refund been as yet allowed or authorized—but only to *certify back* to the Commissioner the amount of the balance, if any, of the overpayment which it was thus found should be refunded. The record shows that not until December 28 did the Collector so certify to the Commissioner that the amount to be refunded in the case of the appellants was—not $182,538.72—but only $84,416.02, an entirely new figure which had not been previously known and which the Collector had determined only after *abating* $98,101.29 of the 1920 assessment which he found to be still unsatisfied, and similarly *crediting* $21.41 against an unsatisfied assessment for some other year.

Let us stop at this point—December 28, 1922—and query whether *the refund* had yet been allowed? The answer is obvious. The Collector had signed the last certificate on Form 7777 Exhibit A, facing R. 8), and the first certificate on Form 7777-A (Exhibit B, facing R. 8,) but the Commissioner was *not yet advised* of the amount *to be refunded* for it was not until still later, on January 16, 1923, that the Deputy Commissioner signed his certificate to the Commissioner on Form 7777-A (Exhibit B, facing R. 8) and trans-

mitted to the Commissioner the schedule on that form which *for the first time advised* him that the "amount to be refunded" was only $84,416.02 and not $182,538.72. Furthermore, the Authorization of the Commissioner to the Disbursing Clerk certifying the amounts to be refunded and authorizing the payment of the refund *had not yet been signed* and until it was signed by the Commissioner (who under R. S. Sec. 3220 was the only officer authorized to refund or pay back taxes erroneously collected) not one cent would or could be refunded. The answer is obvious—*the refund* had certainly not yet been allowed even as late as December 28, 1922, or at the time the Deputy Commissioner signed his certificate on January 16, 1923, and the action of the Commissioner in stopping the computation of interest as early as December 9, 1922, was in any event erroneous.

2. *The Commissioner's own regulation under this very Revenue Act of 1921, made by him with the approval of the Secretary of the Treasury, points inevitably to the same conclusion.*

Article 1040 of Internal Revenue Regulations No. 62 relating to Section 1324 (a) of the Act of 1921, provides expressly that:

> "A claim for credit or refund is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer, for credit or refund."

Applying this regulation to the facts as shown in the record, it is obvious that not until January 16 did the Commissioner approve any schedule for transmission to any officer who could issue a check for *the refund*. The earlier schedule on Form 7777 did not state the amount to be refunded and was not for transmission to a disbursing officer, and no schedule bearing this amount would ever have been transmitted to the disbursing officer "for refund" until the Com-

missioner signed the authorization on Form 7777-A, which he did not do until January 16.

In the same way T. D. 3260, another regulation similarly promulgated by the Commissioner with the approval of the Secretary, makes clear beyond question that it is only "upon receipt of properly certified copies" of the schedule from the collector that "the Commissioner shall cause * * * the necessary allowance documents (to be) prepared" and that only "upon approval of schedule of refunds Form 7777-A the Commissioner will forward such schedule with the allowance documents to the Disbursing Clerk of the Treasury Department." The full text of T. D. 3260 is attached to this brief as Appendix No. 1, and printed at page 56.

3. *This Court has expressly held that an act such as the signing of the earlier schedule on December 9 can not be considered as a final determination or allowance by the Commissioner.*

An almost exactly similar question arose in several cases under a former regulation which provided that where a claim for refund exceeded $250 the Commissioner should, before it was finally decided, transmit the case to the Secretary of the Treasury for his consideration and advisement, just as the present regulations require the Commissioner similarly to transmit it to the collector for his advice as to the state of the taxpayer's accounts. The question was twice presented to the Court of Claims whether the Commissioner's transmittal to the Secretary of his certificate "that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed" constituted a final award or allowance by the Commissioner, and even though the Commissioner had already ascertained the amount *that had been paid* (which in the present case he did not ascertain until the Deputy Commissioner's certificate of January 16), and even though the Commissioner had certified that the *refunding* had been

allowed (which in the present case he did not do until January 16), the Court of Claims held that there had not yet been any final award or decision by the Commissioner. *Dupasseur vs. United States,* 19 Ct. Cls. 1, *Stotesbury vs. United States,* 23 Ct. Cls. 285. In the latter case that court said:

> "The Court is accordingly of the opinion that in this case the action of Commissioner Pleasonton never reached this point of ultimate decision, and that when the case came back to the Commission's office with the advise of the Secretary of the Treasury, the final decision was to be exercised by the Commissioner."

The *Stotesbury* case came to this Court on appeal, and in its decision, reported in 146 U. S. 196, this Court emphatically affirmed the decisions of the Court of Claims. After reciting the certificate of the Commissioner:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.
>
> A. Pleasonton, Commissioner."

and pointing out that under Section 3220 R. S. (under which the Commissioner still acts) it "may be conceded that the power of final decision is in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury," but that it is very reasonable "that the chief financial officer of the government shall be heard by the Commissioner before a final decision is made," the opinion continues (italics ours):

> "The schedule purports to be transmitted to the Secretary for consideration and advisement, in accordance with the regulations. The certificate made to the Secretary repeats the statement. Read in the light of the seventh regulation, it is as though the Commissioner

said: 'I have examined this claim, and I think it should be allowed, but before final decision I await your consideration and advisement.' *Certainly, if the Commissioner was awaiting for such consideration and advisement, he was not making or intending to make a final decision.* Not only is this the plain import of the language of the schedule, but the further fact that the Commissioner did not comply with either the third, fourth, or fifth regulations emphasizes the correctness of such construction. *He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back;* no entry of a decision appears in any docket; *and no list, including this award, was ever transmitted by him to the First Comptroller of the Treasury;* and the fifth regulation, surely, is within the competency of the Secretary of the Treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, *make it perfectly clear that no final determination was made* or intended *by Commissioner Pleasonton.* Therefore, *the matter was one still pending until the action of Commissioner Douglas, on November 9, 1871, rejecting the claim.''*

This decision in itself is so closely in point that it is absolutely controlling in the present case. Here in the same way the Commissioner from December 9 to January 16 was waiting for advice from the Collector and the Deputy Commissioner, and did not, and in fact could not under the regulation, until so advised on January 16 make or transmit any formal certificate of the amount which should be paid back, and it must be concluded, in words similar to the concluding words of the Court, that the matter was one still pending at all times prior to the action of the Commissioner on January 16, 1924.

To the same general effect, that a refund is not allowed prior to the determination of the amount to be refunded, is a well established line of decisions of this Court which hold that an allowance by the Commissioner of Internal Revenue for the refund of a tax illegally collected is not the simple passing of an ordinary claim by an ordinary

accounting officer but an *award* upon which an action may be brought, and which is conclusive unless impeached for fraud or mistake:

> *United States vs. Kaufman*, 96 U. S. 567,
> *United States vs. Savings Bank*, 104 U. S. 728,
> *Louisville vs. United States*, 169 U. S. 249.

4. *Three federal courts have already held that under the procedure here in question the signing of the earlier schedule does not constitute allowance of the refund.*

In the *Birkenstock* case, 6 Fed. (2d) 679, already, referred to, the Commissioner signed the first schedule (corresponding to Form 7777) on May 19, the Collector signed his certificate on June 30, and the Commissioner did not sign the second schedule (corresponding to Form 7777A) until August 12. The Court of Appeals of the District of Columbia, in affirming the decision of the Supreme Court in favor of the taxpayer, said:

> "The record discloses that no finding or order respecting the payment of interest upon the refund was made or could have been made by the Commissioner until June 30, 1924, at which time the Collector at Philadelphia reported the result of his investigation."

In that case the new provisions of the Revenue Act of 1924 had been enacted on June 2, between the dates of the first and second schedules, and the only question was whether the allowance was before or after June 2. The court continued (italics ours):

> "In the present instance, however, the repeal of the former act, and the enactment of the latter *before the refund in question was paid or ordered to be paid*, necessarily required that *the allowance and payment* should be under the latter act."

In *Merchants Loan & Trust Co. v. Smietanka*, decided July 15, 1925, and as yet unreported, the United States District Court for the Northern District of Illinois made a similar decision.

There can be no question therefore that the claims for refunds in this case were not allowed on December 9, 1922, as assumed by the Commissioner, and we now address ourselves to the question as to whether they were allowed within the meaning of statute at the time the Commissioner signed the Schedule of Refunds on January 16, 1923, or not until they were actually paid during the month following. The latter alternative will be first considered.

IV. A REFUND IS NOT ALLOWED UNDER THE STATUTE UNTIL IT IS ACTUALLY PAID BY THE ISSUANCE TO THE TAXPAYER OF A CHECK FOR THE AMOUNT OF THE REFUND, AND APPELLANTS' REFUNDS WERE THEREFORE NOT ALLOWED UNTIL FEBRUARY 6, 1923, AND FEBRUARY 20, 1923, RESPECTIVELY, AND APPELLANTS ARE ENTITLED TO INTEREST TO THOSE DATES.

1. *At the time of the enactment of the statute it had already been held that an "allowance" of a refund, under the same R. S. Section 3220 under which these refunds were made, was not consummated until the taxes were actually paid back by a check being issued to the taxpayer, and it must be presumed that Congress used the term in its judicially settled meaning.*

The present refunds were made under R. S. Section 3220, as reenacted by Section 1315 of the Revenue Act of 1921 (42 Stat. 314), which provided:

> "Sec. 3220. The Commissioner of Internal Revenue * * * is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected * * * ."

The provision for payment of interest was a new provision, enacted for the first time as Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 316). It provided:

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows * * *"

Congress thus provided expressly that the interest should run "to the date of such allowance," and apparently did not contemplate that there was any ambiguity in this provision. And that there was in fact no such ambiguity would seem to be established beyond possible question when we find that the courts had already judicially determined exactly what was an "allowance" of a refund under R. S. Sec. 3220.

In *Ridgway v. United States*, 18 Ct. Cls. 707, that question was squarely presented and passed upon. The Commissioner had certified to the allowance of plaintiff's claim for refund (just as in the present case he did on January 16, 1923) and transmitted it, under the then practice, to the Fifth Auditor of the Treasury who in turn transmitted it to the First Comptroller. The latter for some reason returned it to the Commissioner, who on reconsideration rejected the claim. The plaintiff then brought suit in the Court of Claims on the Commissioner's orginal "allowance" and the only question was whether the suit could be maintained under that Court's jurisdiction to enforce an allowance by the Commissioner made under R. S. Sec. 3220. The court held that there could be no allowance until it was consummated by issuance of a check, saying—

> "The statute under which the Commissioner first certified to an allowance in this case provides that:

> 'The Commissioner * * * *may refund and pay back* all taxes, erroneously or illegally assessed or collected,' etc.
>
> Until, therefore, the taxes were paid back the action of the Commissioner authorized by the statute was not consummated. The sending of his order to the accounting officers in the course of departmental business did not place it beyond his power of recall. They are officers of the same department as the Commissioner, and under the same official head. Their duties are to examine accounts and place them in a condition for payment. The processes of the Treasury Department are all *ex parte*, and not finally consummated beyond recall until a check has been issued upon a warrant duly signed by the Secretary of the Treasury, as we have pointed out in former cases. *McKnight's Case*, 13 C. Cls. R. 292; *Buffalo Bayou R. R. Case*, 16 C. Cls. R. 245. * * *"

To much the same effect is *Straus v. Wanamaker*, 175 Pa. 213, 225, in which the Supreme Court of Pennsylvania sanctioned the use "allow" in the sense of "pay."

It is well established by the decisions of this Court that where a term used in a statute has acquired a settled meaning through judicial construction it will be construed as being used in that meaning—

> *United States v. Merriam*, 263 U. S. 179, 187,
> *Clairmont v. United States*, 225 U. S. 551, 558,
> *Latimer v. United States*, 223 U. S. 501, 504,
> *Kepner v. United States*, 195 U. S. 100, 124.
> *The Abbotsford*, 98 U. S. 440.

In *United States v. Merriam, supra*, this Court said at page 187:—

> "The word 'bequest' having the judicially settled meaning which we have stated, we must presume that it was used in that sense by Congress."

In the same way the word "allowance," having a judicially settled meaning when used in connection with a refund under R. S. Sec. 3220, we must presume that it was used in that sense by Congress. Nor is there any reason to believe that this presumption does violence to the actualities, as will now be shown.

2. *Any other construction is unreasonable, because the Commissioner may, at any time before actual payment of the refund, suspend or reverse his authorization of its payment, and in a number of cases he had actually done so.*

Even after signing the Schedule of Refunds on Form 7777A the Commissioner may still suspend or reverse his authorization of the payment of the refund, just as he did forty-five years ago in the *Ridgway Case, supra,* and in practice he actually does both.

Since the payment two years ago of the refunds in this case he has added an additional requirement that after the disbursing officer has made out the check he shall send it—not to the taxpayer—but to the local Collector of Internal Revenue, who is to hold it until he asks and receives from the taxpayer a certificate that there are no other outstanding and unpaid assessments against him. This procedure applies in every case, in spite of the fact that the Collector has already checked the outstanding assessments as originally instructed on Form 7777. A copy of a typical letter from a Collector to a taxpayer, and of the certificate required, is attached to this brief as Appendix No. 2, and printed at page 59. And that this requirement is no idle form is common knowledge, as illustrated by the case of another of our clients. In that case a refund check for 1917 was sent to the Collector on April 20, 1925, but at the time of sending this brief to the printer, its delivery to the taxpayer has been *suspended* for more than six months, because an additional assessment for 1918 is still unabated although the Board of Tax Appeals in June 1925 held that it should be abated in its entirety.

And that the Commissioner may similarly *reverse* his scheduled authorization of the payment of a refund is illustrated by the case of still another taxpayer who is one of a class each of whom only a few months ago was advised that a refund based on an overassessment that "had been scheduled to the Collector for your District * * * has been deleted from the refund schedule" in compliance with a request of a Senate Investigating Committee. (A copy of such a letter to a taxpayer is attached to this brief as Appendix No. 3 and printed at page 60.)

These instances, which are common knowledge and typical of the present practice and requirements of the Bureau of Internal Revenue and of which this Court may properly take judicial notice (*Caha v. United States*, 152 U. S. 211) show that an allowance under R. S. Sec. 3220 is not consummated today *until a check has actually been issued to the taxpayer* any more than it was at the time of the decision in the *Ridgway Case, supra.*

3. *Any other construction is unreasonable, because actual payment of the refund is the only act provided for by statute, and each of the other preliminary acts* (*a*) *is merely a procedure of an administrative officer which he can at will abolish or modify, and* (*b*) *has in fact, by administrative interposition of successive additional such acts, been moved further and further back in point of time from the actual payment.*

The refunds in the present case were made, and Forms 7777 and 7777A relating thereto were prepared, in accordance with the procedure prescribed by T.D. 3260, an administrative regulation made by the Commissioner with the approval of the Secretary of the Treasury. (A copy of T.D. 3260 is attached to this brief as Appendix No. 1, and printed at page 56.) It needs no argument to show that this procedure, thus created by administrative officers, can in the same way be abolished or modified by them at will, as has in fact actually happened. It is quite conceivable

that the Commissioner, on receipt of a claim for refund, might sign an allowance of whatever amount may in the course of audit be developed to have been an overpayment, and delegate to a Deputy Commissioner, just as he has delegated many similar functions, all further determination and formal certification of the exact amount. In such case it might equally well be claimed that the allowance took place months earlier than the time at which the Commissioner has held it to have occurred in this case!

Thus, for example, paragraph 8 of T.D. 3260 provides that upon approval by the Commissioner of the Schedule of Refunds on Form 7777A it shall be forwarded to the Disbursing Clerk, who shall then prepare disbursement checks and forward such checks to the taxpayers. This was done in the present case and took three weeks in one instance and five weeks in the other. But since that time other steps have been added successively, each of which tends to further delay actual transmission of the check to the taxpayer, and to increase the time during which the overpayment is retained by the Government.

One such additional step is a requirement now in effect that after final certification by the Commissioner, but before transmission to the disbursing officer, the Schedule of Refunds must first go to General Accounting Office of the Comptroller General to check as to whether any other Department or establishment of the Government has any offsetting claims. Another such additional step is the even more recently adopted requirement that after the check is made out it shall be held by the local Collector until the taxpayer is asked for and gives the certificate already described on page 50[33] of this brief, and which in the case there referred to has already injected an additional six months delay between the signing of the last schedule by the Commissioner and the actual delivery of the check to the taxpayer.

Is it not unreasonable to believe that Congress intended that the date at which interest on the refund stops running

should have a constantly changing meaning or should be a sort of movable feast, which at the whim of administrative officers might in point of time be moved further and further back from the date at which the refund is actually paid to the taxpayer? Is it not more reasonable to presume that Congress used the term allowance advisedly, and in the sense in which it had already been judicially construed?

4. *Any other construction is unreasonable because in practice the check is often not received for many months after the Commissioner signs the Schedule of Refunds on Form 7777A.*

In the present case one refund check was received in about two months and the other in about two months and a-half after the Commissioner signed Form 7777 on December 9, 1922, the date at which he stopped the running of interest. But in many cases the elapsed time after the signing of the schedule is much greater, and not a few cases have come to our attention in which it was as much as six or even eight months. Some of the causes of these delays have already been referred to and need not be repeated, but it might also be mentioned that if a taxpayer happens to reside in a large city where the Collector's office is busy it often takes the Collector a couple of months longer to check and return the schedule than in the case of Collectors in some of the smaller districts where the work of the office is not so far behind. Or if a taxpayer's overassessment happens to be on the same schedule with one in favor of a fiduciary who has not given the Collector a court certificate of his appointment, or with one in favor of a taxpayer whose account is mixed up, the return of that particular schedule may be and often is delayed for months.

Is it not unreasonable to believe that Congress intended that because of such fortuitous circumstances which have absolutely nothing to do with this case, a particular taxpayer is to be denied interest for perhaps six months of the period during which his overpayment is retained by the

Government while another more fortunate taxpayer is denied it for only two months? Is it not more reasonable to presume that Congress used the term *allowance* advisedly, and in the sense in which it had already been judicially construed?

5. *The normal and natural meaning of the words of the statute is that interest is to be paid to the time when the refund is actually paid to the taxpayer.*

Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 316) is as follows:

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The normal and natural meaning of these words is obviously that interest should be paid up to the time when the refund is actually paid. That is the general rule governing the computation of interest throughout the English-speaking world and there is nothing in the statute to indicate an exception so ridiculous and artificial as that sought to be engrafted upon Section 1324 (a) by the Commissioner. When reduced to final analysis the absurdity of the Commissioner's interpretation is apparent. He attempts to hold that by signing in his own office a paper, devised by

administrative officers and not required by any statute, at a time when, as actually happened in this case, there was no appropriation available for payment of the amount admitted to be due, he can stop the running of interest, even though as here the payment was not actually made for nearly two months, or as in other cases which have come to our attention for more than eight months after he signed the schedule. With equal logic and reason might a debtor claim that by signing and giving to his clerk a memorandum to make a check for the payment of his debt he had thereby stopped the running of interest even though it was not until several months later that he was able to send the check to his creditor.

It takes no subtle reasoning to show that the Commissioner's interpretation is likewise inequitable and contrary to the manifest purpose of the statute. In the first place the principal refunded and on which this interest is computed is an amount of money erroneously or illegally exacted as a tax and hence money erroneously or illegally held by the Government. The taxpayer has been wrongly deprived of the use of this money during the entire period in which it is held by the Government and it is just as fair and just that he should receive compensation by way of interest for the last three months in which it was retained as for the three months next preceding, and it is believed that Congress has so provided. The taxpayer has in effect loaned the money to the Government. It is obvious that Congress recognized this situation and intended to provide in this statute that the taxpayer should be compensated for the loss in the use of his money. This is all the more clear when it is remembered that conversely it was for the first time provided in the same Act that if a taxpayer failed to pay a tax when due he shall pay interest thereafter (Section 250, Revenue Act of 1921, 42 Stat. 264, 265). This manifest purpose of the statute is defeated when it is sought to construe it to mean that after the running of interest has started it shall be computed for any period less

than the full period during which the Government continues to hold the money.

It is submitted that the normal meaning of the words of the statute is clear and that interest should be computed until the time when the refund is actually made. It is submitted that the words of the statute do not contemplate or permit the Commissioner to stop the running of interest by an act which is not required by law, which does not put any money into the hands of the claimant, which might be and in some instances is done months prior to the actual payment, which might be and in many instances is done before Congress has even made the appropriation out of which the refund is to be paid, and the date of which the claimant is ordinarily not advised even after the refund and the interest as computed by the Commissioner have been paid.

6. *It is the well-established custom of both the business and the legal worlds that interest runs to the date of payment, and there is nothing in the statute to indicate that Congress intended to express any different rule.*

It is further submitted that in view of the well recognized customs of both the business and the legal worlds there is not the slightest ground for thinking that Congress either attempted or intended to express a meaning such as that which the Commissioner has sought to place upon this statute. That interest should be paid up until the date of *payment* is such an old and well-established principle and one so taken as a matter of course that it is seldom raised in reported cases since it was established once and for all time by Lord Mansfield in 1760.

In *Bodily v. Bellamy*, 2 Burrows 1094, where suit was brought in England on a bond made in India, Lord Mansfield held at page 1098 (italics are from the original, and the 5 per cent referred to was the then legal English rate of interest)—

> "So here, in the present case, interest ought to be paid after the rate of *9 per cent* according to the *Indian*

> allowance, *till* the ascertainment of the sum to be paid, by *signing the judgment;* and *from that time,* till the *actual payment* of the money, after the rate of *5 per cent* only, upon the accumulated sum ascertained by the judgment: for *that* is the *real damage* which the plaintiff has sustained by the delay of his execution and the detention of his debt."

The rule thus laid down long ago by Lord Mansfield is so well recognized that it seldom even has to be mentioned in the reported cases. It is, however, occasionally reiterated. In *National Bank v. Mechanics Bank,* 94 U. S. 437, this Court quoted with approval from another decision of Lord Mansfield made in the same year (*Robinson v. Bland,* 2 Burrows 1087), where he said (italics ours)—

> "I don't know of any court in any country (and I have looked into the matter) which does not carry interest down *to the last act by which the sum is liquidated.*"

and in Section 1 of Rule 28 of the Rules of this Court it is provided (italics ours):

> "Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below *until the same is paid,* at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered."

In *Vashon v. Barrett,* 105 Va. 490, the Court said at page 493 (italics ours):

> "The general rule is that he who has the use of another's money must pay interest upon it from the time he receives it *until he repays it,* unless there be an agreement, express or implied, to the contrary."

The reported cases do, however, clearly indicate that the courts have not permitted debtors to stop the running of interest by any *ex parte* acts on their own part short of

actual payment. Thus in *Lamprey v. Mason,* 148 Mass. 231, it was held that where the maker of a note made request on the payee to state what amount remained due, the failure of the payee to comply with the request did not stop the running of interest; and in *Williamson v. Farson,* 199 Ill. 71, it was held that a notice published three times within six days before the date set in the notice for presenting overdue negotiable county bonds for payment is not such reasonable notice as will stop the interest on that date, as to holders not having actual notice of the call. An interpretation such as that placed on this provision by the Commissioner is capable of such gross abuse as might, if the Commissioner so desired, entirely defeat the expressed intent of Congress that interest should be paid.

7. *Section 1324 (a) is a remedial provision, and if there remains any possible doubt that it expresses the intent of Congress that interest runs to the payment of the refund, it should be construed liberally to that effect and resort may be had to its legislative history.*

That a provision such as this one, providing for the first time in the revenue laws for the payment of some interest on overpayments of taxes, is a remedial statute is obvious. That a remedial statute must be liberally construed so as to most fully effectuate its purpose is established beyond question:

> *Logan v. Davis,* 233 U. S. 613,
> *United States v. Colorado Co.* 225 U. S. 219,
> *Dubois v. Hepburn,* 10 Peters 1,

and that if there remains any doubt as to its construction or as to the intent of Congress resort may properly be had to its legislative history as an aid to its construction is equally well established:

Tap Line Cases, 234 U. S. 1,
Lapima v. Williams, 232 U. S. 78,
United States v. Burr, 159 U. S. 85.

The legislative history of this particular section shows clearly that Congress intended that interest should be paid to the date when the "refund" is actually paid and never contemplated that the running of interest should be stopped at some date which is ordinarily unknown to the taxpayer and which is frequently, as in this case, several months before the actual payment of the refund.

Section 1324 (a) was not a part of the Revenue Act of 1921 as passed by the House of Representatives, but was proposed as an amendment by the Finance Committee of the Senate, adopted by the Senate, and subsequently accepted by the House on the recommendation of the Conference Committee. The report of the Finance Committee as presented by Mr. Penrose (67th Congress, First Session, Senate Report No. 275, pages 32-33) contains the following clear statement of the purpose of this amendment (italics ours):

"INTEREST ON REFUNDS.

"Section 1324 makes an important change from existing law in providing that interest shall be paid on the overpayment of taxes at the rate of 6 per cent a year as follows:

(1) If such amount was paid under a specific protest, from the time when the tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim. This provision is inserted for the purpose of expediting the refund of taxes and compelling the Government, *in the event that such refund is unnecessarily delayed,* to pay interest at the ordinary rate."

This amendment adding subdivision (a) of Section 1324 was adopted by the Senate without further debate and finally enacted by Congress in the same form in which it was originally reported by the Committee on Finance, and the report of that Committee just quoted shows clearly that it was intended that interest was to be paid *until the actual refund is made,* and excludes any possibility of the running of interest being stopped at any earlier date. In passing, however, it may be noted that in discussing a proposed amendment which became subdivision (b) of Section 1324, Senator Jones of New Mexico asserted on the floor of the Senate, and without contradiction, "That provision [Section 1324 (a)] has been adopted by the Senate. Therefore, clearly it is the view of the Senate that in case of the unlawful collection of an internal revenue tax *it shall be refunded with interest.* That is the provision we have put in, but that covers only the case where the refund is made by the Commissioner of Internal Revenue or through the machinery provided for such refund" (Congressional Record, Vol. 61, p. 7506). Then to carry out to a logical conclusion this purpose to require payment of interest the Senate passed subdivision (b) of Section 1324 amending the Judicial Code and providing for the allowance of interest on judgments against the United States for any internal revenue tax erroneously or illegally collected.

In the provision of the Revenue Act of 1921 here in question the time at which the interest starts to run varies under different conditions, and it does not in all cases start with the original payment of the excessive taxes. Three years later when Congress enacted the Revenue Act of 1924 it decided, however, to make the interest start in all cases at the time of the original payment and continue during the entire period of their retention, and it so provided in Sec. 1019 of the Revenue Act of 1924 (43 Stat. 346) which reads:

> "Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

It will be noticed, however, that no change is made in the phraseology as to the date *to which* interest runs. Substantially the same phrase "to the date of the allowance" is used as was used in the Act of 1921. But that Congress all the time intended that the interest should run to the very date of payment we now have conclusive proof, for in identical terms the Committees of both Houses in recommending the passage of this particular section of the Revenue Bill of 1924, as it was then known, said (italics ours):

> "If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest *during the period of their retention;* and the fact of protest or a claim does not affect the merits of such an interest payment."—68th Congress, 1st Session, House Report No. 179, p. 72; Senate Report No. 398, p. 46, paragraph 3.

and to accomplish that purpose they used the same term—"allowance"—which had been used in the earlier act. Can there remain any possible doubt that in Section 1324 (a), just as in Section 1019, Congress intended interest to run

to the time of actual payment? Could there be any stronger confirmation that this was the original remedial purpose sought to be accomplished in the enactment of Section 1324 (a) of the Revenue Act of 1921?

It is submitted therefore that the judgment of the court below should be reversed and the case remanded with directions to enter judgment for the plaintiffs for $2,028.11 on paragraph VII of its Findings (R. 7).

V. APPELLANTS' REFUNDS CANNOT UNDER ANY CONDITIONS BE HELD TO HAVE BEEN ALLOWED PRIOR TO JANUARY 16, 1923.

(NOTE. If the Court agrees with the conclusion urged in Point IV immediately preceding, this Point V becomes immaterial and may be passed over.)

For the reasons already fully set forth under Point III at pages 23 to 30 of this brief there can be no question that the Commissioner's signature on Form 7777 on December 9, 1922, did not constitute allowance within the meaning of the statute, and that the allowance did not under any conditions take place prior to January 16, 1923.

On that date the Deputy Commissioner signed on Form 7777-A (Exhibits B and C, facing R. 8) a "certificate" addressed to the Commissioner and advising him *for the first time* "the amounts of overpayment to be refunded by disbursement checks as indicated (being the entire overassessment of $107,372.36 for 1917, *but only* $84,416.02 *out of the original overassessment of* $182,538.72 *for 1920*) have been found due." This was the first time that the Commissioner had ever heard of the amount $84,416.02. Clearly the Commissioner had not yet, and this was January 16, allowed its *refund*.

But later on that same day, January 16, the Commissioner, having received the certificate of the Deputy Com-

missioner, and having been thus advised of the amounts that had, since he previously signed the instructions to the Collector, been found to be refundable, and so certified on December 28 by the Collector and on January 16 by the Deputy Commissioner, signed *for the first time* the authorization allowing *the refunds* and *for the first time* authorized the *payment back* of the refunds. Clearly, therefore, there was no allowance of the refunds until January 16 at the earliest. If by any chance this Court does not agree with the conclusion reached in Point IV of this brief, then it is submitted that in any event the judgment of the court below should be reversed and the case remanded with directions to enter judgment for the appellants for interest on $107,372.36 and on $84,437.43 in each case from December 9, 1922, to January 16, 1923.

It is also to be noted that the *Birkenstock* case, 6 Fed. (2d) 679, while directly in point in its holding that interest ran to the date of the Commissioner's signature on the second schedule (corresponding to his January 16 signing of the Schedule in this case) did not hold contrary to the conclusion urged in Point IV that interest should run to the date of actual payment. That point was not before the courts in the *Birkenstock* case. The tax in that case had not been paid under protest and claim for refund had only recently been filed, so that under the restrictions of Section 1324 (a) of the 1921 Act only a small amount of interest was payable whereas under the more liberal provisions of Section 1019 of the 1924 Act as to the starting of interest from date of payment there would have been several years interest. It so happened that the first schedule was signed just before the passage of the 1924 Act and the second schedule just after its passage and only a short time before the actual payment of the refund. The record shows that the taxpayers in that case did not therefore present the question as to what was the exact date of the "allowance" *but only urged that it was not prior to the date of signing the second schedule.*

VI. APPELLANTS ARE ALSO ENTITLED TO INTEREST ON THE REFUND FOR 1920 FROM THE ORIGINAL DATE OF PAYMENT OF THEIR TAXES FOR THAT YEAR.

1. *Where, as here, both installments of the tax were paid under a specific protest setting forth the basis of and reasons for such protest, interest on the refund should be computed from the time when the tax was paid, even though the refund was made for a different reason.*

Shortly before the appellants made their income tax return for 1920 the United States District Court for the District of Connecticut had decided that a profit on the sale of capital assets was not subject to income tax. During the year 1920 the appellants had sold their manufacturing business at a profit which they erroneously computed as approximately $349,000. The regulations of the Treasury Department required that such a profit be returned as taxable income and the appellants accordingly made and filed their return for 1920 on that basis but attached thereto a specific protest (Findings, paragraph IV, R. 5) setting forth the decision of the United States District Court for the District of Connecticut as the basis of and reason for the protest.

The two installments of the tax which were paid on March 15, 1921, and June 15, 1921, were paid under this specific protest which set forth in detail the basis of and reasons for such protest. Section 1324 (a) provides as follows (italics ours):

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) *if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was*

> *paid,* * * * or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. * * *"

Substantially all of both of these installments have since been refunded but interest has been paid only from February 2, 1922, *i. e.,* from six months after August 2, 1921, when the claim for refund was filed by the appellants. In other words, interest has been computed under clause (3) of the above Section instead of clause (1).

The facts bring this case clearly within clause (1) and appellants are entitled to judgment for interest on the amounts refunded from the dates when they were paid up until February 2, 1922, which was the date from which interest has been computed by the Commissioner.

It is true that the decision of the District Court was subsequently reversed by this Court (*Walsh v. Brewster,* 255 U. S. 536) and that the refund was finally made on a different ground, viz., that the amount of the profit under the Treasury Department's regulations had been erroneously computed and grossly overstated on the original return. The language of the statute is plain, however, and the case comes clearly within it in that a specific protest was made and the grounds set forth, and neither the Treasury Department or the courts can properly add a new additional limitation that the refund must be made on the same ground as alleged in the specific protest. Where Congress has made no exception to the positive terms of a general statute the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. The courts cannot engraft on a statute a limitation which the statute does not contain or add an exception based on supposedly equitable grounds when Congress did not make such an exception:

> *Corona Coal Co. v. United States,* 263 U. S. 537,
> *Louisville, etc., Ry. Co. v. Motley,* 219 U. S. 467,

American Express Company v. U. S., 212 U. S. 522,
Tillson v. United States, 100 U. S. 46,
Yturbide v. United States, 22 How. 290.

In the *Corona* case this Court said:

> "But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction; and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

and in the *Yturbide* case it was held that—

> "if Congress had desired to grant such authority it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

In the same way with respect to the present statute—if Congress had intended to limit the cases in which interest should run from the date of payment to those where the refund was subsequently made *on the same ground* as alleged in the specific protest it would have been easy for it to have said so, and the fact that it did not say so must lead irresistibly to the conclusion that it did not intend to impose any such limitation. That Congress did not so intend is further confirmed by the report of the Finance Committee of the Senate (quoted on page 42 of this brief) in which it is stated that under this provision interest is to be paid from the date when the tax was paid if such amount was paid under a specific protest (without any further qualification), thus indicating that a specific rather than a general protest was the one and only qualification that Congress had in mind.

It is submitted therefore that judgment should also be entered for the claimant for the additional amount stipulated in paragraph VIII of the Findings (R. 7), viz., $3,889.67.

2. *The June 15 installment was also paid under an additional specific protest which set forth the same basis and reasons on which the refund was eventually made.*

Prior to June 15, 1921, when the second installment was paid, the appellants were advised that the supposed profit was apparently grossly overstated and they engaged accountants to recompute it correctly. The second installment was therefore paid on June 15 under the specific protest set forth in full in paragraph IV of the Findings (R. 5-6) and interest on the refund of the amount paid on June 15 should therefore be computed from June 15, 1921, without any question, since the basis of the protest and the basis of the refund allowed were the same.

It is submitted therefore that in any event judgment should be entered for the claimant for $1,472.91 as stipulated in paragraph IX of the Findings (R. 7), being part of the $3,889.67 referred to above.

VII. INTEREST FROM THE DATE OF PAYMENT SHOULD BE COMPUTED EQUALLY UPON THE QUARTERLY OVERPAYMENTS AS OF THE DATES WHEN THE RESPECTIVE INSTALLMENTS WERE PAID.

Section 250 of the Revenue Act of 1918 (40 Stat. 1082) under which the tax for ~~1919~~ 1920 was originally collected provides (italics ours):

> "(a) That except as otherwise provided in this section and sections 221 and 237 *the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax.* The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. * * *

> (b) As soon as practicable after the return is filed, the Commissioner shall examine it. *If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed.* If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

The statute thus clearly established each one-fourth installment as the basis of payment, and expressly contemplated that there would be an overpayment "if the amount already paid exceeds that which should have been paid *on the basis of the installments as recomputed.*"

The appellants' correct tax liability for 1920, on the basis of which the refund was made, was finally determined at $13,663.89. The first installment recomputed on this basis should have been $3,415.98, whereas in fact $49,050.66 was paid as the first installment on March 15, 1921. This overpayment of $45,634.68 has been refunded and it is clear that under the statute any interest computed from date of payment should be computed on this amount.

In the *Birkenstock* case, 6 Fed. (2d) 679, a different basis of computation was urged by the Government, but both the Supreme Court of the District of Columbia and the Court of Appeals held that it should be computed as here claimed. The latter court said:

> "We think also that the lower court was right in requiring that the increased interest should be computed equally upon the quarterly overpayment as of the dates when the respective installments of taxes were paid."

It is submitted therefore that the additional interest should be so computed.

VIII. APPELLANTS ARE ENTITLED TO AN ADDITIONAL REFUND FOR 1917 OF $767.79 WITH INTEREST.

The supposed excess profits tax against appellants for the year 1917 as originally determined and assessed early in 1918 in the amount of $108,140.15 was paid and satisfied in full on or about March 21, 1918, by the payment in advance to the Collector of Internal Revenue at Philadelphia of $108,140.15, less $767.79 interest thereon from that date until June 15, 1918, the date on which the payment was due.

The Commissioner on subsequently holding that appellants as fiduciaries were not subject to any profits tax refunded only $107,372.36, the net amount actually paid in cash, with interest thereon, and rejected the claim for refund for the balance.

The only further question is whether the difference of $767.79 should not also have been refunded.

Examination of the statute and the regulations shows beyond doubt that the original transaction consisted of a payment by the taxpayer of the full amount of the supposed tax and of the counterpayment by the Government of interest *on the full amount* for the number of days by which it was paid in advance of the date when it was due, and that the mere fact that for convenience and in conformity with well established business custom only one cash payment was required to be made of the net difference between the two amounts does not in any way alter the legal nature of the transaction. One of the most ordinary and natural transactions in the business world when two parties each owe the other different amounts is a settlement of both accounts by a single payment of the net difference. For example, A buys an automobile from B for $1,000 and B owes A $75 for services rendered. Both accounts are settled by the payment of $925 by A to B. Later the automobile proves unsatisfactory and under the terms of the guarantee A returns it to B and the purchase price is refunded. There

is no question that the amount to be refunded is $1,000 and argument is unnecessary to prove such a self-evident truth.

In the same way in the present case the amount to be refunded is the full $108,140.15 and further argument would seem almost unnecessary. The $767.79 was interest computed *on the full $108,140.15* and paid by the Government for the use of *the full $108,140.15* for a period of nearly three months during which the trust estate *advanced* that amount of money to the Government because even if it had been subject to the tax its payment as tax was not due until June 15, 1918. The fact that the tax was subsequently found not to be due does not change the fact that the Government actually had the use of this advance or loan for three months before it would have been due in any event, nor does it entitle the Government to reimburse itself for the interest which it paid thereon in accordance with the law and regulations. Just as in the hypothetical case B was still under obligation to pay for A's services so in this case the Government is in no way relieved from paying interest on the advance of which it actually had the benefit.

That this is the true nature of the transaction is confirmed by examination of the statute under which the payment of interest was authorized. Section 1009 of the Revenue Act of 1917 (40 Stat. 326) provides in part (italics ours):

> "That the Secretary of the Treasury, under rules and regulations prescribed by him, shall permit taxpayers liable to income and excess profits taxes to make payments in advance in installments or in whole of an amount not in excess of the estimated taxes which will be due from them, and upon determination of the taxes actually due any amount paid in excess shall be refunded as taxes erroneously collected: * * * *Provided further,* That the Secretary of the Treasury, under rules and regulations prescribed by him, *may allow credit against such taxes so paid* in advance of an amount not exceeding three per centum per annum *calculated upon the amount so paid* from the date of such payment to the date now fixed by law for such pay-

> ment; but no such credit shall be allowed on payments in excess of taxes determined to be due, nor on payments made after the expiration of four and one-half months after the close of the taxable year. * * *"

The terms of the statute show clearly that it contemplated that in a case such as this the taxpayer was paying the "whole" of the tax and that the Secretary of the Treasury should "allow credit" for interest "against such taxes so paid in advance." In the present case the $108,140.15 constituted "such taxes so paid in advance" and the $767.79 was computed *on that amount* and constituted the interest which was allowed as a credit against the taxes.

In a very recent case, *Carnegie Steel Co. v. United States*, 60 Ct. Cls————, decided June 8, 1925, the Court of Claims held in an almost identical case that, where under Sec. 407 of the Revenue Act of 1916 (39 Stat. 789) a corporate taxpayer is entitled to credit against its capital stock tax any amount it has paid as munitions tax, the credit constitutes "a payment of that much of the capital stock tax" and is to be considered as "paid under that section", *i. e.*, the section imposing the capital stock tax.

And the Commissioner himself, in a recent ruling I. T. 1948 (Internal Revenue Cumulative Bulletin III-1, p. 343) has held that where a taxpayer paid in advance under this very same section 1009 of the 1917 act, and on final determination his tax was found to be a different amount, he should be credited with having paid—not the net amount (corresponding to the $107,372.36 in the present case)—but the full amount (corresponding to the $108,140.15 here), and that the taxpayer is entitled to the difference, just as is here claimed.

It is submitted therefore that the appellants, having thus paid in full the original assessment of $108,140.15, and having been held not subject to any tax whatever, are entitled to refund of its full amount, and that the judgment of the court below should be reversed and the case remanded

with directions to enter judgment for $767.79 with interest from June 15, 1918 (Revenue Act of 1924, Secs. 1019, 1020, 43 Stat. 346).

IX. CONCLUSION.

The judgment of the court below should be reversed and the case remanded with directions to enter judgment for the following items:

1. Interest of $2,028.11 as computed in paragraph VII of Findings (R. 7), or in any event interest on $107,372.36 and $84,437.43 from December 9, 1922, to January 16, 1923;

2. Interest of $3,889.67 as computed in paragraph VIII of Findings (R. 7), or in any event interest of $1,472.91 as computed in paragraph IX of Findings (R. 7); and

3. Refund of $767.79 with interest from June 15, 1918.

Respectfully submitted,

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JOHN W. TOWNSEND,
Counsel for Appellants.

Washington, D. C.
November, 1925.

APPENDIX NO. 1 (Italics Ours).

(T. D. 3260)

Refund, Credit, and Abatement Adjustments.

TREASURY DEPARTMENT.

Office of Commissioner of Internal Revenue
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

For the more expeditious handling of refund, credit, and abatement claims, and to provide for the refund or credit or overpayments of revenues where no claims have been filed, *the following procedure is established to become effective December 16, 1921:*

1. Reduction of internal revenue assessments and adjustments of overpayments of revenues will hereafter be accomplished in one of three ways:

(a) On the basis of an application submitted by a taxpayer on Form 46, 47 and 47A, together with appropriate supporting evidence to be filed in the office of the collector of internal revenue of the district in which the tax is assessed.

(b) On the basis of a certificate of overassessment prepared by the appropriate administrative unit in the Bureau in each case in which an overassessment of tax is disclosed through the audit of a return.

(c) On the basis of a blanket claim (Form 751); a schedule of taxes found to be uncollectible (Form 53); or a schedule of duplicate payments and overpayments due to obvious error on all forms of taxable returns (blanket form 47 or 47B) submitted by a collector of internal revenue. Form 751 will be used only in cases where credit balances exist, regardless of the class of return filed.

2. *Claims of taxpayers* and the items of collectors' blanket claims (if and *when found by an administrative unit to be allowable*), and certificates of overassessment

(upon final approval), and items credited in account 9 (e) *shall be scheduled on Form 7777 and submitted to the Commissioner of Internal Revenue for approval. Upon approval* by the Commissioner, *such schedules shall be forwarded to the collectors of internal revenue of the several districts.*

3. *Upon receipt of such schedules the several collectors of internal revenue shall* immediately *check the items thereon against the accounts of the several taxpayers concerned and determine whether the several amounts of overassessments should be abated, refunded, or credited against assessments remaining unpaid.* Only overpayments of income and profits taxes may be credited against unpaid assessments of such taxes (Section 252 of the Revenue Act of 1921). Whenever, on such examination of a taxpayer's account and of the items in account 9 (e), a collector finds an amount of overpayment, he shall examine all accounts of the taxpayer for subsequent periods and determine and certify the amount, if any, of such overpayment that shall be credited against the taxpayer's account for any subsequent year or years and the amount of such overpayment for which a disbursement check should be issued. He shall thereupon make appropriate entries upon all copies of the schedule and upon the assessment list, indicating the application made by him of the several amounts of overassessment and overpayment (whether by abatement or by credit), and the amounts to be refunded; summarize the amounts applied in abatement, the amounts of overpayment and of credit; certify all copies of the schedule; retain one copy; and forward the others to the Commissioner of Internal Revenue at Washington.

4. *The Collector shall* at the time *prepare* (in quadruplicate) *on Form 7777A a schedule of net refundable amounts for which disbursement checks are to be issued;* retain one copy of the schedule for his record; certify the other three copies and forward them together with the copies of the schedules on Form 7777 to the Commissioner of Internal Revenue at Washington.

5. Upon application of the several amounts of overassessment and overpayment as abatements or credits, and the determination of the amounts to be refunded, the Collector of Internal Revenue shall make the appropriate entries upon the certificates of overassessment which will be

forwarded to him with the schedules; and transmit appropriate copies of such certificates to the several taxpayers as notification of the action taken by the Collector in the way of abatement or credit; provided however, that in those cases in which any amount of overpayment is to be refunded, the Collector shall not send the certificate of overassessment to the taxpayer but shall make the appropriate entries thereon and forward such certificates of overassessment with the schedule of refundable amounts to the Commissioner of Internal Revenue at Washington.

6. Upon completion and certification of a schedule, the Collector of Internal Revenue shall credit the accounts with the amounts abated and credited and make proper notations of the refunds. The proper account 6 will be credited, and account 18 will be debited with the total amount abated and applied as credits for the reduction of tax liability. Account 9 (e) will be debited with the total amount applied as credits from items in account 9 (e). The procedure as outlined in Section 583 of the Internal Revenue Manual, in cases of this nature, should be carefully followed.

7. *Upon receipt of properly certified copies of Form 7777 and 7777-A the Commissioner shall cause to be made the necessary entries* in the control accounts of the Bureau of Internal Revenue, *and the necessary allowance documents prepared.* Upon receipt of these schedules the Accounts Unit of the Bureau of Internal Revenue shall retain one copy of Form 7777 for its records *and forward a copy to* the General Accounting Office of *the Comptroller General* as a voucher for the collection accounts of the Collector. *He shall retain one copy of the schedule of refunds form 7777-A* for his records; make the necessary entries upon and *forward two copies with the allowance documents to the Commissioner for his approval.*

8. *Upon approval of schedules of refunds Form 7777-A the Commissioner will forward such schedules with the allowance documents to the Disbursing Clerk of the Treasury Department.*

9. *Upon receipt of properly approved schedules and allowance documents, the Disbursing Clerk shall prepare disbursement checks in the amounts of the several net refundable items* in favor of the respective taxpayers against whose accounts net refundable amounts shall have been allowed by the Commissioner; *forward such checks,* together

with the certificates of overassessment (which will be transmitted to him) *to the respective taxpayers;* retain one copy of this schedule for his record; and transmit the other copy to the General Accounting Office of the Comptroller General as a voucher for his disbursement account.

D. H. BLAIR,
Commissioner of Internal Revenue.

APPROVED: December 8, 1921.
A. W. MELLON,
Secretary of the Treasury.

APPENDIX NO. 2.

(On Letterhead of Treasury Department, undated)
Columbia, S. C.

_____ _____Co.
_____, S. C.

Sir:

The office is holding a check drawn in your favor by the Disbursing Clerk of the Treasury Department on account of an over-payment of overassessment of income tax in the amount of $5,954.40.

Before this check can be released, it will be necessary for you to sign the statement below, or to forward one substantially similar thereto.

Your prompt attention will facilitate your receipt of check.

Respectfully,

(Signed) JNO. F. JONES,
Collector of Internal Revenue.

RE: A & C Mim.
Coll. 3239.

To the Collector of Internal Revenue,
Columbia, S. C.

I hereby certify that there are no outstanding internal revenue taxes against me, which are due and payable, in your or any other office of a Collector of Internal Revenue.

I also certify that I did not take credit in my income tax return filed during the current year for any amount representing an overpayment of tax on account of a prior year's account.

(Signed) .....

APPENDIX NO. 3.

(On Letterhead of Treasury Department.)

Washington, Feb.—, 1925.

IT: R: CC: No. 3 ES.
C———— Co.,
————, ————.

Sirs:

Advice has already been furnished that you were overassessed by the Bureau of Internal Revenue for income taxes in the amount of $6,395.05 for the year 1918, and that the overassessment had been scheduled to the Collector for your District to be applied in the adjustment of your account.

You are now informed that the Collector has returned to this office the schedule upon which your item of overassessment was listed, indicating the following adjustment:

Refund	$6,395.05
Interest	2,091.83

However, the Senate Committee investigating the Bureau of Internal Revenue has requested that no amount of overassessment based upon a natural resource valuation or allowance for amortization be refunded or credited pending its inquiry into the Bureau's practice in administering the provisions of the various revenue laws dealing with these subjects.

Accordingly, the item has been deleted from the refund schedule and final adjustment will be withheld pending a further understanding between the Bureau and the Senate Committee.

Respectfully,

J. G. Bright,
Deputy Commissioner.
By Wm. F. Sherwood,
Head of Division.